IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.6054 OF 2005

IN

FIRST APPEAL (ST)NO.12075 OF 2005

Ferdinand Francis Fernandes .. Applicant

V/s

Francis V.D'Souza & Ors. .. Respondents

Mr.P.S.Dani for the Applicant.
Mr.R.R.Naik for the Respondents.

CORAM : DR.S.RADHAKRISHNAN,J.

DATE : 29TH JUNE, 2006.

P.C.:

1. Heard the learned Counsel for the parties. Perused the Civil Application. By this Application, the Applicant is seeking leave to file an Appeal. The learned Counsel for the Applicant brought to my notice the impugned judgment and decree dated 10th October, 1996 passed by the learned Single Judge of the Bombay City Civil Court, wherein in paragraph Nos.6 & 7 read as under :-

> 6. "The other aspect on which the maintainability of the suit would depend would be aspect of joinder of essential parties. The Plaintiff is seeking declaration of ownership in respect of portion of a plot which admittedly belonged to deceased Frank and after his death, it automatically would vest in all his heirs. Thus, the declaration in respect of the plot would affect all the

heirs and consequently, they would be essential parties to the suit. The Advocate

for the plaintiff contends that in 1991 proceedings before the survey authorities, it was defendants alone who claimed ownership and in spite of notices to other heirs namely, two daughters and one son, they did not appear and contest the claim of the defendant. Under these circumstances as the name of defendant alone has been shown in survey records as owner, it is not necessary for him to seek declaration against the other heirs. This contention to say the least, is implausible. The ownership is not lost by absence during the revenue proceedings. The failure to raise contentions may amount to abandonment of right, but such abandonment unless and until made under registered documents, would not legally extinguish the right and in absence of a registered document, the right could be extinguished only after the passage of 12 years on the ground of exclusive adverse possession to the knowledge of the other heirs. The plaintiff himself has alleged that defendant has been acting under the instigation of her son and thus, the son in the name of defendant is disputing title of the plaintiff. Under these circumstances, the plaintiff would have a cause of action not only against the defendant, but against all the heirs, one of which his own wife. Under these circumstances it is seen that all the heirs of deceased Frank are necessary parties to the suit and cause of action has arisen against them in favour of the plaintiff."

7. "The next question consequently to be considered is whether failure to join them would render the suit non maintainable. The failure to join other heirs would not affect the right of those heirs in any way, but it certainly would create a bar against the plaintiff under O.II Rule 2 to seek relief against them in subsequent proceedings. In spite of this position being pointed out to the advocate for the plaintiff, he contends that the others are not likely to contest his title and hence, the plaintiff does not wish to sue them. The failure to join other heirs thus would result into creation of a bar against plaintiff under O.II Rule 2 and as the result of which he would be precluded from challenging the title of other heirs to the portion which he is seeking a declaration for. With this handicap, the suit against defendant

alone would continue to be maintainable. In the result I answer the issue in the affirmative.

2. Contents of the above paragraphs clearly indicate that the Applicant, being the legal heir of the Frank ought to have been impleaded in the above suit. In fact, the learned Single Judge of the Bombay City Civil Court in paragraph No.6 in the last sentence, has clearly observed that the heirs of the deceased Frank are necessary parties. If that be so, prima facie the very decree will be null and void on the ground of failure to implead the present Applicant, who is undisputedly a son of the said Frank and a necessary party. Hence, the Civil Application is made absolute in terms of prayer clause (a).

(DR.S.RADHAKRISHNAN,J.)